IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	**No. 37565-6-II**
	)	
Appellant,	)	
	)	
v.	)	
	)	
BRIAN LEE GARNER,	)	
	)	
Respondent.	)	
_____	)	**UNPUBLISHED OPINION**

Korsmo, J. — Mr. Brian Garner and the Cowlitz County Prosecuting Attorney's Office entered into a plea agreement that called for an exceptional sentence on a charge of failure to register as a sex offender. The trial court accepted the agreement and sentenced Mr. Garner in accord with its terms: a prison term that exceeded the standard range and no term of community custody despite a statutory range of 36-48 months. The trial court later declined a request from the Department of Corrections to impose a standard-range term of community custody. The prosecutor's office then appealed to this

court. We dismiss the appeal because the prosecutor's office invited the error.

FACTS

Brian Lee Garner was charged with one count of failure to register as a sex offender in Cowlitz County cause No. 07-1-00594-1. Clerk's Papers (CP) 1-2. He also was charged in cause No. 07-1-00547-9 with possession of a controlled substance. Report of Proceedings (RP) 1, 5; CP 5.

A plea agreement was reached by which the parties treated the failure to register charge as an unranked felony even though Mr. Garner had two prior convictions for failure to register among his six prior adult felony convictions.[1] RP 4; CP 3-10, 13. Those prior convictions normally would make the crime a level two offense, with a corresponding range of 33-43 months based on an offender score of eight.[2] RCW 9.94A.510; RCW 9.94A.515. An unranked offense carries a standard range of 0-12 months. CP 11; RCW 9.94A.505(2)(b).

The plea agreement called for the parties to recommend an exceptional term of 17 months in prison and request that the court not impose community custody. CP 5. Mr. Garner pleaded guilty on June 6, 2007. RP 1-5; CP 3-10. Mr. Garner and his counsel

[1] An amended information was filed at the time of the guilty plea hearing, but that document has not been designated in the Clerk's Papers for this appeal.

[2] Mr. Garner's prior conviction for second degree rape, the offense that triggered his reporting requirement, would count three points in his offender score, while the five other offenses would score one point each. RCW 9.94A.525(18).

explained to the trial court Mr. Garner's teenage daughter was killed in an automobile accident shortly before his next reporting date and that he was scheduled to report on the date of her funeral. He did not report and simply "wasn't functioning." RP 4.

The trial court accepted the guilty plea and dismissed the drug possession charge. RP 5; CP 12-23. It then imposed the jointly recommended 17-month prison sentence and did not impose community custody. RP 4-5; CP 17.

The Department of Corrections wrote the court and the parties on February 11, 2008, asking the trial court to amend the judgment and sentence to include the specified term of community custody. CP 24-37. The request pointed out that the failure to register conviction was "eligible" for a 36-48 month term of community custody per RCW 9.94A.715. CP 24.

The trial court conducted two very brief hearings as part of busy calendars. A different deputy prosecutor than the one who had negotiated the plea agreement represented the State on those occasions. She believed that the crime was a sex offense that required community custody.[3] RP 6-7. Defense counsel indicated that he did not believe the crime was considered a sex offense, but that, if it were, the trial court should not impose community custody in light of Mr. Garner's circumstances. RP 8-9.

[3] According to defense counsel, the State provided briefing on the topic. RP 8. No trial brief has been designated among the Clerk's Papers.

The trial judge declined to impose community custody, citing the plea agreement. RP 10-11; CP 38. The prosecutor's office appealed the trial court's order denying the request to "clarify" the judgment and sentence. CP 39-40.

ANALYSIS

The primary problem[4] with this appeal is that the State asked the court as part of its plea agreement not to impose community custody. It later appealed that decision. The invited error doctrine prohibits a party from contributing to an error in the trial court and then trying to take advantage of that error on appeal. *E.g., State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995); *State v. Studd*, 137 Wn.2d 533, 545-549, 973 P.2d 1049 (1999).

This case is a prime example of the invited error doctrine. The State made a plea bargain, asked the trial court not to impose community custody, and then later appealed the decision not to impose a term of community custody. The Department of Corrections would have been able to pursue a post-sentence petition, RCW 9.94A.585(7), if it desired to challenge the absence of community custody from Mr. Garner's sentence.[5] The county

[4] As to the merits of the issue, this court last year ruled that despite a cross reference error created when the Legislature renumbered some sections of the Sentencing Reform Act (SRA), failure to register as a sex offender is still a "sex offense" under the SRA, and is subject to a term of community custody. *See State v. Castillo*, 144 Wn. App. 584, 183 P.3d 355 (2008), and *State v. Albright*, 144 Wn. App. 566, 183 P.3d 1094, *review denied*, 164 Wn.2d 1028 (2008).

[5] Any such challenge would have been futile. A trial judge who declares an

prosecutor could not do so.[6] Having successfully asked the trial court to not sentence Mr. Garner to a term of community custody as part of a compassionate plea agreement, the prosecutor's office is not in a position to claim that the court erred in doing so.

The appeal is dismissed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

_____
Van Deren, C.J.

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Penoyar, J.

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exceptional sentence has the authority to impose an exceptional term of community custody that either exceeds or is less than the statutory term. *See, e.g., State v. Hudnall*, 116 Wn. App. 190, 194-198, 64 P.3d 687 (2003); *State v. Davis*, 146 Wn. App. 714, 192 P.3d 29 (2008). Thus, the trial court's action here was within its exceptional sentence powers.

[6] The prosecutor's office would breach the plea agreement with Mr. Garner if it attempted to impose community custody at a re-sentencing. *See, e.g., State v. Sledge*, 133 Wn.2d 828, 838-843, 947 P.2d 1199 (1997).